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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 351

HAROLD PARKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

LORING B. MOORE,
123 West Madison Street,
Chicago 2, Illinois,

MOORE, MING & LEIGHTON,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3988

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Harold Parker, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on May 27, 1957.

CITATIONS TO OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit printed, Appendix B hereto, infra p. iii, is reported in 244 F. 2d. .....

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 27, 1957. Appended to Appendix p. ....., infra. Rehearing was denied on July 8, 1957. Appended to Appendix p. ..... The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

I.

Whether the testimony of the petitioner before the January, 1955, Grand Jury on January 20, 1955, given under circumstances where he was under subpoena and the unmistakable target of the Grand Jury investigation and was not advised of his right under the Fifth Amendment when called as a witness not to be compelled to give evidence against himself, could be used: (1) As a basis for indictment; and (2) in evidence in his trial for perjury?

II.

Whether the convictions of the petitioner for perjury under the Perjury Statute, Section 1621, 18 United States Code, can stand where based upon his testimony given upon the occasion of the petitioner being called as a witness on January 20, 1955, before the January, 1955, Grand Jury when he was in no manner informed by the United States Attorney or Grand Jury of the subject matter of the Grand Jury investigation?

III.

Whether the petitioner was entitled to have the United States Court of Appeals for the Seventh Circuit, upon appeal to that court, examine and weigh the effects upon the trial jury of substantial errors of the trial court in the conduct of the trial, in restricting cross examination, in admission of evidence, and in instruction of the jury?

STATUTE INVOLVED.

The statutory provisions involved are Section 1621, 18 United States Code. They are printed in Appendix A, infra, p. i.

STATEMENT OF THE CASE.

The petitioner, Harold Parker, was tried in the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Julius J. Hoffman, judge presiding, before a jury on three counts of perjury, Section 1621, Title 18, United States Code. Jurisdiction of the trial court was based upon Section 3231, Title 18, United States Code. The charges arose out of his testimony before the January, 1955, Federal Grand Jury. The original indictment contained five counts, Counts Three and Five of which were dismissed on motion of the Government when the case was called for trial. The petitioner was found guilty of Counts One and Two and not guilty of Count Four of the Indictment. Judgment was entered upon the two counts of which the petitioner was found guilty. The United States Court of Appeals for the Seventh Circuit affirmed the convictions.

The originals of all documents, transcripts, exhibits and other parts of the District Court records as filed in the District Court and brought forward to the Circuit Court of Appeals have been transmitted as part of the record for the petition for certiorari.

The petitioner, Harold Parker, on January 17, 1955, was served with a subpoena requiring him to appear on January 20, 1955, before the January, 1955, Federal Grand Jury. He appeared before the Grand Jury and gave testimony on January 20, 1955, and at continued hearings on March 21, 1955, and August 8, 1955.

Immediately before and concurrently with the service of the subpoena and his first appearance as a witness before the Grand Jury on January 20, 1955, certain signi-

ficant newspaper articles were published concerning his projected appearance.

In its issue of January 17, 1955, the Chicago Daily Tribune published a lengthy front page article headed "'Business Man' Revealed in Policy Payoff." "He is 'Little Boy Blue' Parker." A picture of the petitioner appeared at the head of the column. The article related that the petitioner had been named by a certain Claude Murphy, a "convict-informer," "as a key figure in 'payoffs' which benefit certain politicians and police at the rate of $500,000 a year," and that "Murphy, who will repeat to the federal grand jury this week the story he gave The Tribune about policy payoffs to specific politicians and police, named Parker as the 'man' for a southside police officer who collects richly from the racket." The article, also, stated that "Murphy asserted that the 10 per cent cut to the one police officer—$3,000 a month—was turned over to the officer's 'man,' and never to the policeman personally. That 'man,' Murphy said, was Parker." The article further stated that "Irwin N. Cohen, chief counsel for the city council crime committee, disclosed that he has given Murphy several lie detector tests to check his account of the protection payoffs," but that Cohen had "refused to disclose their results," and that "Murphy's full story * * * has been turned over by The Tribune to United States Atty. Robert Tieken" (Exhibit A to Defendant's Motion to Dismiss Indictment, App. 30).

In its issue of Thursday, January 20, 1955, another article appeared in the Chicago Tribune headed "Convict Tells Policy Payoff Names, Data" which related that Claude Murphy, "convict-informer" who spent four and one-half hours in the grand jury room Tuesday, was closeted with the 23 grand jurors for another five and

one-quarter hours yesterday, and still had not completed his story. Taken back to prison last night, he will be returned today for further testimony, officials said."

"Indications that he is giving detailed evidence were seen not only in the unprecedented amount of time he has been testifying, but also in the comment made to newsmen by a federal prosecutor." The article stated, among other things, that:

"'The man' to whom the funds for the one police officer were handed, according to Murphy, was identified by him as Harold (Little Boy Blue) Parker, 43, of 6846 Calumet Av., who will appear before the grand jury today" (Exhibit H to Defendant's Motion to Dismiss Indictment; App. 30).

On January 20, 1955, when the petitioner first appeared in response to the subpoena to be a witness before the January, 1955, Grand Jury, he was not informed by any representative of the United States District Attorney's office, or by any person connected with the Grand Jury, as to what the Grand Jury was investigating, nor was he advised as to any rights that he might have under the Fifth Amendment to the Constitution in respect to being a witness against himself (Exhibit D to Defendant's Motion to Dismiss Indictment; App. 30; Government's Exhibit 1B; App. 42). Counts One and Two upon which the petitioner was tried and convicted were based upon the petitioner's testimony given on January 20, 1955.

Upon the occasion of the petitioner's appearance on March 21, 1955, the Government's attorney gave warning to him "that this Federal Grand Jury is conducting an investigation of possible tax evasions under the Internal Revenue Codes of 1939 and 1954 in connection with so-called policy games and other types of gambling," "to determine whether there are any taxes due and owing

to the United States of America," "that you may be one of the persons involved, and I want to warn you that this Grand Jury may have occasion to pass upon your actions, upon your conduct, and upon your testimony here," "that under the Fifth Amendment to the Constitution of the United States of America you have the privilege to refuse to answer any questions or make any statement which might incriminate or tend to incriminate you. You do not have to give any testimony against yourself here" (Exhibit B to the Defendant's Motion to Dismiss Indictment, p. 2343-44; App. 30).

The petitioner in his Motion to Dismiss the Indictment contended that Counts One and Two of the Indictment, being based upon his testimony given on January 20, 1955, in response to subpoena, was illegally obtained under the circumstances and could not be, properly, the basis of the indictment of him, he not having been advised as to the general subject matter of the investigation being conducted by the Grand Jury and he not having been advised as to his rights under the Fifth Amendment. He further represented that he was "a defendant" in the circumstances of him being called under subpoena to testify before the Grand Jury and submitted in support thereof Exhibits A and H, being the newspaper articles hereinbefore described. He also submitted an affidavit showing his limited formal education (fourth grade elementary school), that he did not have the benefit of counsel prior to his appearance and that he was in fact without knowledge of his right not to be compelled to give evidence against himself (Motion, App. 12-20; Exhibit D; App. 30).

As an additional ground for dismissing Counts One and Two of the Indictment, the petitioner in his Motion to Dismiss cited the provisions of Section 1621, Title 18 United States Code, referring particularly to the clause,

"willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true." He asserted that it was necessary that the petitioner, upon being sworn to be examined as a witness, be informed as to the general subject matter of the grand jury investigation "in order to be informed as to the relevancy of such matters and things inquired of him for answer, and in order that the pertinency of his answers, if any, might be adjudged by him as to truthfulness and responsiveness, and in order to be informed, as well, as to the effect of such answers as might pertain to his right not to testify against himself in the premises of the investigation," that he had in no manner been informed as to what the grand jury was investigating, that he was entitled "to be as fully informed when called to testify as Counts One and Two of the Indictment now inform him," that the United States District Attorney and Grand Jury had failed to so inform him when he was called on January 20, 1955, to testify before the Grand Jury. (App. 12-20)

Counts One and Two of the Indictment, returned by the August, 1955, Grand Jury, alleged that the January, 1955, Grand Jury on or about January 20, 1955, was engaged in investigating "possible tax evasions under the Internal Revenue Codes of 1939 and 1954 in the so-called policy games and other types of gambling." Count One charged that "it became material for the Grand Jury to learn the petitioner had been in New York in order to determine whether or not the petitioner had met a certain Claude Murphy there," and that he had "stated under oath, in substance that he had not been in New York, New York, since 1945, when he was discharged there when he knew that said statement was not true." Count Two charged that it became material for the

Grand Jury "to learn when the petitioner "met a certain Claude Murphy and what the nature of their relationship was," and that he stated "that he had never met Claude Murphy but saw him for the first time in Luther Rawling's tavern and thereafter only spoke with him casually or passed him on the streets when he knew that said statement was not true. (Indictment, App. 6).

In respect to the factual allegation of Count One, the petitioner in his Motion to Dismiss the Indictment contended that the specific question asked him as shown by the transcript was "Did you ever meet Claude Murphy in New York" and that the indictment did not charge that the answer given by him was not believed by the petitioner to be true. In respect to the factual allegation contained in Count Two, the petitioner showed that he had in fact in his testimony before the Grand Jury stated in substance that he had known Claude Murphy in 1952 and had stated what his relationships were and tendered in support thereof the affidavit of Chauncey Eskridge, an attorney at law, analyzing his testimony before the January, 1955, Grand Jury and showing that more than thirty-nine inquiries were made of the petitioner as to Claude Murphy, that at least twenty-four inquiries specifically referred to the year 1952, and that other inquiries save the ones specifically dealing with the year 1953 pertained to years or periods not specified by examining counsel, and that he had testified fully in such answers as to relationships of petitioner with Claude Murphy (Motion to Dismiss Indictment; App. 12; Exhibits B and C to Motion; App. 20).

In addition in respect to all five counts of the indictment, the petitioner in his motion to dismiss charged that the counts were based upon the testimony of Claude Murphy, a person known to the United States District

Attorney, who had produced the witness before the Grand Jury, to be a not credible person, and in support of this contention filed certified transcripts showing indictments of Claude Murphy, and convictions of the "convict-informer" on charges of operating confidence games, armed robbery, and conspiracy, and his incarceration from 1944 through the year 1950, and from 1954 through the period of the convict-informer's testimony before the Grand Jury (App. 27; Exhibits E, F, and G to Defendant's Motion to Dismiss Indictment).

The petitioner also contended that trial under the indictment would operate to deprive him of due process of law as provided for in the Fifth Amendment to the Constitution.

The trial court denied the motion of the petitioner to dismiss the indictment.

Upon trial evidence of petitioner's testimony before the January, 1955, Grand Jury was offered by the Government in a series of exhibits, being Government Exhibits 1A and 1B and 2B, 3A and 3B, and 4A and 4B being respectively stenographic notes ("A" Exhibits) and transcripts ("B" Exhibits) of four different court reporters. Exhibits 1A and 1B and 2A and 2B were offered as testimony on January 20, 1955, and contained the specific items of testimony upon which Counts One and Two were based.

In the course of interim cross examination of the court reporter on Exhibits 1A and 1B, the petitioner's attorney uncovered as many as ten corrections of the transcript to conform to the notes within the range of eight pages of the testimony, and ascertained that the transcript was not in fact prepared by the stenographer-witness.

The trial court overruled objections based upon gross inaccuracy of the notes and transcript, upon the want of relevancy of contents, and upon the constitutional grounds urged in the Motion to Dismiss Indictment, and admitted in evidence Government's Exhibits 1A and 1B, being the first eight pages of the testimony of the petitioner given on January 20, 1955, and subsequent motions to strike the exhibits from evidence were likewise overruled (App. 42-45).

In dealing with the petitioner's claim of violation of the self-incrimination privilege, the trial court suggested that "the mere possibility that the witness may later be indicted does not require that he be advised of his rights under the Fifth Amendment" and inquired whether the petitioner had been indicted by the January, 1955, Grand Jury. The petitioner's attorney responded that he had attempted to have disclosed through the first witness, the foreman of the Grand Jury, whether, in fact, the petitioner was not the object of the investigation, and as to whether the petitioner had been advised of his rights under the self-incrimination privilege, but had been prevented from doing so by the rulings of the court (App. 44). As to the contention of want of relevancy of the material in the exhibits, the Government's attorney contended that "it is the Government's position that the jury should have a right to see all of a man's testimony so that they can put into proper context the questions and answers about which we are charging him with perjury." The trial court stated that he would let his ruling stand (App. 46).

The balance of the testimony of the petitioner on January 20, 1955, before the Grand Jury was presented in the form of Government's Exhibits 2A and 2B, being, respectively, the stenographic notes and transcript. The

trial court announced that it would not permit on interim cross examination the latitude permitted on the former exhibit and overruling the objections of the petitioner, admitted Government's Exhibit 2B, the transcript, in evidence.

Upon cross examination the witness, who had testified that she had taken the notes and made the transcription, was asked to locate in her notes, Government's Exhibit 2A, page 744 of Government's Exhibit 2B, on which page the particular alleged perjured testimony charged in Count One appears. She was then asked to point out the symbol for "San Francisco" which she did. The witness was asked if there was an erasure and she said there is a penciled note for "San Fran." The witness testified that she could, in putting down the symbol, make a mistake, could hear incorrectly, that it is possible for anyone to do so, that, as she remembered it, he said, "San Francisco." She was asked if she knows where San Pedro is located, to which she answered in California or Mexico. The trial court thereupon interrupted the examination and stated, "I am interested in geography and all that but I haven't got the time, Mr. Moore." "I don't care if this witness knows where San Pedro is. Don't take my time." The petitioner's attorney persisted to get the attention of the court but the court insisted that it did not want to go into geography, that the witness is tendered as a court reporter who took some notes and requested that the petitioner's attorney limit the cross examination to the direct. The petitioner's attorney then stated that he had no contemplation that the particular question might be outside the range of proper cross examination and protested that the court in indicating his attitude toward the question in the cross examination "should be careful not to prejudice this jury against the defendant." Whereupon the court excused the jury and admonished the petitioner's attorney. (App. 51-56).

(Subsequently, it was developed, as per the testimony of the petitioner and his Army Discharge (Defendant's Exhibit 2) that he had stated that he went to New York after being discharged from San Pedro at a camp in San Pedro by the name of Ft. McArthur. (App. 147-152.))

Thereafter the court restricted the cross examination by the petitioner's attorney to whether or not the transcript covering Exhibit 2B, conformed to her notes, Government's Exhibit 2A, and petitioner's attorneys were not permitted to cross examine in respect to Exhibit 2B, the transcript, as compared with Government's Exhibit 2A, the shorthand notes, specifically, in respect to obvious typing changes on the transcript involving the specific item charged in Count Two as constituting perjury and as to other changes in the transcript as originally delivered to petitioner's attorney before the trial pursuant to order of court, nor upon the changes reported in the Government's Bill of Particulars delivered pursuant to order of court. (App. 56-67.)

In the course of cross examination upon Government's Exhibits 3A and 3B, being the testimony given by the petitioner on March 21, 1955, (Exhibit B to Defendant's Motion to Dismiss Indictment) the Government's attorney interrupted the cross examination and, upon the jury being excused, the Government moved for leave, first, to withdraw Exhibits 3A and 3B, and, subsequently, Exhibits 1A and 1B, and 2A and 2B, with leave to substitute pages 738 and 744 of Government's Exhibit 2B, and to have these pages remarked and entered into evidence in lieu of Government's Exhibits 1A and 1B and 2A and 2B and also for leave to withdraw Government's Exhibits 3A and 3B. An extensive colloquy thereupon took place. (App. 72-84) Thereafter in open court the Government asked leave to withdraw from evidence Government Exhibits 3A and 3B

and to strike the oral testimony of the reporter-witness, and the court allowed the motion of the Government and instructed the jury to disregard the exhibits and the testimony. Thereupon the petitioner's attorneys moved for a mistrial and that Exhibits 1A and 1B and 2A and 2B be stricken. (App. 84-86).

After further evidence tendered by the Government and the close of the Government's case in chief the petitioner moved for a judgment of acquittal upon the grounds of errors in the rulings of the court as to cross examination and the admission of evidence, prejudicial effect of the procedures of the Government in the presentation of the evidence, and insufficiency of the evidence to warrant submission of the case to the jury which motion was denied. Thereupon the petitioner tendered evidence denying the accuracy of the transcriptions of his testimony before the Grand Jury and stating what his testimony, in fact, had been and affirming his own testimony in the premises. In course of the petitioner's testimony, the witness stated that he had testified to the Grand Jury of his visit to New York in 1951, of the occasion for it, and identified the persons who were present at the time such testimony was given and, specifically, identified an assistant United States Attorney present upon his trial who was present in the Grand Jury room at the time that he gave such testimony. Persons identified by him were not called by the Government as witnesses on rebuttal. (App. 132-179).

In the course of his testimony the petitioner's attorney asked the petitioner if he was told on January 20, 1955, as to what the Grand Jury was investigating. Upon objection by the Government's attorney the court sustained the objection. The court contended that whether or not he was so informed was not material, that "there is the

transcript" and petitioner's attorney pointed out that some of his testimony had been withdrawn. (App. 156-157). Upon cross examination the petitioner affirmed that he had testified to the Grand Jury as to being in New York in 1951 when Mr. James and Mr. Reeb were present for the Government, that the occasion was the occasion "when Mr. James was there whenever that was." (App. 172-177).

Upon close of all the evidence the petitioner made motion for judgment of acquittal, and, in addition to the grounds already urged upon the motion of the petitioner for judgment of acquittal at the close of the Government's case, specifically, pointed out to the court irrelevant and prejudicial matters contained in Government's Exhibits 1A and 1B, 2A and 2B, and 4A and 4B. The court denied the motion of the petitioner for a judgment of acquittal at the close of all the evidence.

The court charged the jury that "the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment of the Constitution when summoned to give testimony before a grand jury," over the objections of the petitioner's attorney that such instruction is prejudicial "because it suggests the possibility of an indictment" (App. 189-205).

Upon appeal by the petitioner the United States Circuit Court of Appeals for the Seventh Circuit affirmed the judgment appealed from, herein sought to be reviewed. In affirming the judgments below the United States Circuit Court of Appeals for the Seventh Circuit stated "we leave undiscussed but not unconsidered other questions presented on Defendant's behalf. Those questions include, inter alia, sufficiency of evidence, conduct of the trial, various rulings on exhibits, reception of evidence and

scope of examination. Well briefed as those points were we found on close analysis that they failed in reaching the status of reversible errors."

In his petition for re-hearing the petitioner suggested to the court that "in view of the fact that the court has not given any discussion in the opinion of any of the questions raised by the defendant except questions under the Fifth Amendment, wilfulness, and materiality, the defendant suggests that the court consider the impact upon the jury of the errors of the trial court in admission of evidence, restricting cross examination, and in the conduct of the trial."

The petition for re-hearing was denied.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

Under the Self-Incrimination Clause of the Fifth Amendment.

1. The decision of the court below is believed erroneous and in conflict in principle with the decisions of this Court in cases involving the Self-Incrimination Clause. In *Smith* v. *O'Grady*, 312 U. S. 329, 61 S. Ct. 572, this Court held that it is the obligation of the courts to guard and enforce every right secured by the Constitution. This Court has repeatedly held that the Amendments to the Constitution frequently referred to as the Bill of Rights are restraints against Government invasions of the personal rights established and guaranteed thereby. Recently in *Ullman* v. *United States*, 350 U. S. 422, 76 S. Ct. 497, in both the majority and dissenting opinions, the Court expressed concern as to the maintenance of the privilege against encroachment and whittling away. In *Quinn* v. *United States*, 349 U. S. 155, 75 S. Ct. 668, and in *Emspak* v. *United States*, 349 U. S. 190, 75 S. Ct. 687, this Court indicates the spirit of approach expected in cases involving the Self-Incrimination Clause by rejecting hypercritical tests which, as applied, would have destroyed the vitality of the claims of petitioners in those cases under the Self-Incrimination Clause; and similarly, *Blau* v. *United States*, 240 U. S. 159, 71 S. Ct. 223. In the *Quinn* case the court granted certiorari "because of the fundamental and re-current character of the questions presented." While most of the cases which have reached this Court were contempt cases in which the privilege was in some manner claimed by the witnesses, it is ob-

vious that the spirit of approach applied in those cases would be applied in cases involving uninformed and unadvised witnesses, and, particularly in cases in which witnesses are called before federal grand juries under subpoena process, which are cases in which the witness relies upon the high respect accorded federal governmental proceedings.

2. The judgment below is believed to be in direct conflict with the decision of this Court in *Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524. In *Boyd* this Court held an Act of Congress unconstitutional so far as pertained to it authorizing the compulsory production, through court order upon application by the Government, of "private papers, etc.," and their subsequent admission in evidence by the court in criminal proceedings against the person producing them, to be "erroneous and unconstitutional proceedings." In the *Boyd* case the criminal act set forth involved fraud "by means of any fraudulent or false invoice, affidavit, letter or paper." In *Boyd* the judgment of forfeiture, after jury verdict, was affirmed by the Circuit Court, which judgment of the Circuit Court was reversed by this Court upon review. *United States* v. *Bell*, 81 Fed. 830 (C. A. Tenn. 1897) is still referred to in current encyclopedia of law as a ruling case to the effect that evidence obtained by compulsory process from an unadvised witness who was the object of the investigation cannot be made the basis of a prosecution for perjury.

In *Ullman* v. *United States*, 350 U. S. 422, 76 S. Ct. 497, this Court left the *Boyd* decision "unqualified as it was left unqualified in *Brown* v. *Walker*." 161 U. S. 591, 16 S. Ct. 694.

3. The decision of the court below in the instant case is believed to be not in accord with *Rogers* v. *United States*, 340 U. S. 367 (1951), 71 S. Ct. 438, cited by the court in support of its statement that "to avail himself of the

privilege against self-incrimination a witness is usually required to assert it," citing, also, *United States* v. *Murdock*, 284 U. S. 141 (1931), to the effect "that the privilege will be deemed waived unless invoked." While the *Rogers* case is an application of a restrictive standard to the claim of the privilege (as shown in the dissenting opinion), the majority opinion, nonetheless, is based upon the court's conclusion that there had been a "voluntary waiver of the privilege." The lower court, however, fails to recognize that in the instant case the privilege was never claimed, first, because the witness had no knowledge of it, secondly, because he was not advised by the Government that he had such a privilege, and, thirdly, that he was in no position to claim the privilege, if he did have knowledge of it because he was not informed by the Government as to what the Grand Jury was investigating. The lower court failed to note that there could be neither a voluntary claim nor a voluntary waiver of the privilege by the petitioner in the instant case. It is not believed that *Rogers* is an authority that the privilege is waived under such circumstances. Such a construction of the privilege would create a situation in which unintelligent and uninformed witnesses would as a class be denied the protection afforded by the Self-Incrimination Clause and is a whittling away probably not approved by this Court in either *Rogers* or *Ullman*.

4. It is believed that the decision of the court below is erroneous and in conflict with *United States* v. *Bell*, 81 F. 830 (C. A. Tenn. 1897), and is not in accord with the *dicta* set forth in *United States* v. *Scully*, 225 F. 2d 113, Second Circuit (1955).

In *United States* v. *Bell*, supra, the Court expressly held that testimony given by the witness before the examiner as to his execution of a false pension certificate, where he was not advised of his rights, although an object of

the investigation, could not be used as a basis for prosecution for perjury. The lower court in the instant case, in attempting to make a distinction between the *Bell* case and the instant case, failed to note that whether the crime being investigated is false swearing or income tax evasion, a person who is the object of the investigation is entitled to be silent and to be warned, otherwise the evidence, "unconstitutional," cannot be used against him because such person would, thereby, be compelled to give evidence against himself.

In *United States* v. *Scully* 225 F. 2d 113, also cited by the lower court, while the Second Circuit did hold "that the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment when summoned to give testimony before a grand jury," the court's opinion (Judge Medina) stated that "it is far from clear on this record that appellant was marked for prosecution or that the prosecution was aimed at him or that he was, at the time he testified, in any sense accused of the crime subsequently charged against him," and did further state that "indeed, one would suppose that as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before the grand jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this Court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit." In Circuit Judge Frank's concurring opinion he affirms his belief in *United States* v. *Lawn*, D. C. S. D. N. Y. 115 F. Supp. 674, and states that "the policy embodied in the privilege against self-incrimination has greater force when a man already indicted is called by the prosecutor to testify before the grand jury; for unlike the defendant

at the trial, the defendant before the grand jury appears without counsel to advise him of his privilege. Accordingly I think the necessity of warning such persons is even greater than after the trial commences." Judge Frank further states that "several state and federal courts have gone further in holding or indicating that warning is necessary if it unmistakably appears that, when a witness is under subpoena before a grand jury, the prosecutor then intends to seek the witness' indictment." Citing *United States* v. *Edgerton,* D. C. Mont., 80 F. 374, and *Maffie* v. *United States,* 1 Cir., 209 F. 2d 225, 228-229, and state cases.

The widespread public interest currently existing, induced by extensive investigations, suggests that, particularly in the field of federal grand jury investigations, as a part of the federal criminal judicial process, there should be established clear and uniform rules of procedure, through decisions of this Court under its supervisory powers, regulating federal grand jury investigations. Discriminatory applications must necessary result where practices vary, and may result in bringing the grand jury process into bad repute. This Court has expressed its concern in this respect in *Mesarosh* v. *United States,* ..... U. S. ....., 77 S. Ct. 1, where presumably the zeal of the Government resulted in convictions based upon perjured testimony given by a paid informer. The scope of investigations, currently being considerably enlarged, brings into the spread of the grand jury investigative process larger numbers of citizens whose traditional respect for the federal grand jury as an institution will be greatly enhanced if the constitutional rights of individuals as guaranteed by the constitution are assured protection.

II.

Under the Perjury Statute.

1. The decision of the lower court is believed to be erroneous and in conflict in principle with the decisions of this Court in its holding against the petitioner as to the materiality of the statements made by him before the Federal Grand Jury. The Perjury Statute, Section 1621, 18 United States Code, makes an element of the crime false statements "as to any material matter." Although the decision in *Watkins* v. *United States*, ... U.S. ....., 77 S. Ct. 1173, was not made until after the decision below in the instant case, it embraces the principles of decision applicable in the instant case, it is believed, in such a way as to make clear the erroneous character of the decision. In the *Watkins* case this Court reviews a conviction under 2 United States Code, Section 192, "Contempt of Congress." The Court points out that among the rights available to a defendant in a criminal case, "is the right to have available through a sufficiently precise statute, information revealing the standard of criminality before the commission of the alleged offense. Applied to persons prosecuted under Section 192, this raises a special problem in that the statute defines the crime as refusal to answer 'any question pertinent to the question under inquiry.' Part of the standard of criminality, therefore, is the pertinency of the question propounded to the witness. The court then points out that "it is obvious that a person compelled to make a choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. The decision of the court below is by analogy incorrect in its determination that the statements charged by the indictment as being false were "as to material matters," there being present the vice of vagueness not permissible in

criminal cases where intention is a necessary element of the crime. The Perjury Statute is basic to all federal investigative procedures but must be given strict construction, *Weiler* v. *United States*, 323 U. S. 606, and, especially, in grand jury cases where normal protections available on trial, are not available. The petitioner has been unable to find cases clarifying the situation probably because witnesses are normally informed as to what grand juries are investigating.

III.

Inadequate Review of Prejudicial Errors.

The decision below is believed to be erroneous and in conflict with the standards set up by this Court in *Kotteakos* v. *United States*, 328 U.S. 750, for dealing with prejudicial errors in its holding without more, that "we leave undiscussed but not unconsidered other questions presented in the Defendant's behalf. Those questions include, *inter alia*, sufficiency of evidence, conduct of the trial, various rulings on exhibits, reception of evidence and scope of examination. Well briefed as those points were we found on close analysis that they failed in reaching the status of reversible errors." The errors complained of were not technical errors encompassed by the harmless error provisions of the Federal Rules of Criminal Procedure, Rule 52 (a), but were such that, if errors, might have had substantial and injurious effect or influence in determining the jury's verdict. It seems patent that the reviewing court failed to weigh the possible effects of what errors it may have determined were committed by the trial court. The substantial errors alleged on behalf of the petitioner to have been committed by the

trial court included the admission in evidence of his testimony before the Grand Jury obtained under the circumstances herein related, restrictions on cross examination of the court reporter witnesses, admission of his *entire* testimony before the Grand Jury and the subsequent permission of withdrawal of portions of his testimony, instruction of the jury as to the court's opinion as to the application of the Self-Incrimination Clause to the circumstances of the petitioner's testimony before the Grand Jury where no evidence had been received by the jury on such points, etc., all of which, if errors, might have had prejudicial effect upon the jury.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

LORING B. MOORE,
123 West Madison Street,
Chicago 2, Illinois,
Attorney for Petitioner.

MOORE, MING & LEIGHTON,
123 West Madison Street,
Chicago 2, Illinois,
Of Counsel.

APPENDIX A.

18 U.S.C., § 1621.

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certification by him subscribed, is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2000 or imprisoned not more than five years, or both.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit
No. 11823
September Term, 1956, January Session, 1957.
United States of America,
Plaintiff-Appellee,

vs.

Harold Parker,
Defendant-Appellant.
Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
May 27, 1957.

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Parker, defendant, was convicted by a jury on the first and second counts of an indictment grounded in 18 U.S.C. § 1621 which provides in relevant part that: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose * * * or that any written testimony, declaration, deposition * * * is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2000 or imprisoned not more than five years, or both." Counts Three and Five of the indictment were

dismissed on the government's motion and defendant was found not guilty on the fourth count. After arguments his motion for a new trial was denied and Parker was sentenced to serve three years on the first and second counts, respectively, and fined $1000 and costs on each count, sentences to run concurrently and fines cumulative.

In obedience to a subpoena, Parker appeared and testified under oath on January 20, 1955 before the January, 1955 Federal Grand Jury. Subsequently he was accused by the August Grand Jury, on the two counts under which he now stands convicted, with having allegedly untruthfully testified before the January grand jurors, in substance that: (1) "he had not been in New York, N. Y. when he was discharged there" and, (2) "he had never met Claude Murphy, but saw him for the first time in 1953 in Luther Rawlings' Tavern, and thereafter only spoke with him casually in said tavern or passed him on the street * * * " While the other three counts are also charges of perjury before the January, 1955 Grand Jury their disposition, already noted, make it unnecessary to further describe them.

Relying upon the interdiction of the Fifth Amendment that no person shall " * * * be compelled in any criminal case to be a witness against himself * * * " Parker mounts an attack aimed at the evidentiary basis of his perjury conviction. He attempts to cut ground from under the evidence lying behind the petit jury's verdict with a theory that the several critical counts based upon his own testimony given before the January, 1955 Federal Grand Jury are tainted by an absence of any previous warning to him of his constitutional privilege against self-incrimination. Stated still another way, Parker argues that since the United States Attorney failed to apprise him of his con-

stitutional right, the evidence upon which the indictment is bottomed, having been "illegally" obtained, cannot support the charges regardless of the truth or falsity of Parker's utterances to the January grand jurors. We disagree. While there are a number of other defense points tendered by this appeal we think the Fifth Amendment issue significant enough for attention at the outset.

Blair v. *United States*, 250 U. S. 273, 281-282 (1919) contains Mr. Justice Pitney's neat capsuled version of some background material:

> "* * * it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned * * * The duty so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government * * * (citing) is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him * * * (citing); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all he knows.
>
> "But, aside from exceptions and qualifications * * * the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry. * * *
>
> "He is not entitled to set limits to the investigation that the grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed

> of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual. *Hale* v. *Henkel*, 201 U. S. 43, 65. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of property or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States*, 223 U.S. 178, 184."

Several key points, relevant here, have already been seized by prior decisions and admit little room for controversy. The investigation embarked upon by the January 1955, Grand Jury is a criminal case within the meaning and reach of the Fifth Amendment. *United States* v. *Monia*, 317 U. S. 424 (1943), *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). That body was conducting an investigation of possible tax evasion under the Internal Revenue Codes of 1939 and 1954 "in the so-called policy games and other types of gambling." The grand jury subpoena under which Parker testified, comes within the sweep of the constitutional word "compelled." To avail himself of the privilege against self-incrimination a witness is usually required to assert it. *Rogers* v. *United States*, 340 U. S. 367 (1951). And the privilege will be "deemed waived unless invoked." *United States* v. *Murdock*, 284 U. S. 141 (1931). But Parker would avoid the impact of *Rogers* and *Murdock* on the grounds that he was the target of the January investigation and should have been forewarned by the prosecutor and advised along the lines of

the Fifth Amendment. Any vitality for a requirement that a grand jury witness must be advised of his constitutional rights must flow from notions of fair play and various others attending those circumstances where the prosecutor intends to seek an indictment against the subpoenaed witness. As always the hypothetical academic situation can be simply stated, for example, where the government deliberately subpoenaes a witness in order to elicit evidence helpful in indicting him. But one realistic problem arises where the United States Attorney is unable to foresee the vulnerability of a witness. The Second Circuit, when reviewing and refusing to overturn a trial judge's order denying the defense motion to quash an indictment because of testimony obtained before a grand jury from the defendant without warning him of his constitutional privilege against self-incrimination, held in *United States* v. *Scully*, 225 F. 2d 113, 116 (2nd Cir. 1955) that:

> "* * * the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury."

Curiously enough, Scully was already under indictment when he was called before the grand jury. In his concurring opinion Judge Frank observed "that the policy embodied in the privilege against self-incrimination has greater force when a man, already indicted, is called by the prosecutor to testify before a grand jury." 225 F. 2d 113, 116.

"The maxim *nemo tenetur seipsum accusare*," we are taught by *Brown* v. *Walker*, 161 U.S. 591, 596 (1896) "had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and,

until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. • • • So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." See also: Emery's case 107 Mass. 172, 181 (1871) for a discussion of the maxim; 8 Wigmore, Evidence § 2250 (3rd ed. 1940) and compare the historical views in *Maffie* v. *United States*, 209 F. 2d 225, 227 (1st Cir. 1954). But the privilege is aimed at inquiries made to lay bare criminating facts, usually of past matters. Parker's perjury was previously uncommitted and his criminal liability concurred with the words he first uttered to the January Grand Jury. The evidence of perjury coincided with the act of testifying in the grand jury room during January, 1955. He was not indicted for any prior perjurious statements, if indeed there ever were any, made before his January appearance in the grand jury room. For that reason we think Parker's perjurious utterances are wholly estranged from the Fifth Amendment privilege he claims was invaded. Mr. Justice Reed, speaking for the majority of a divided court in *United States* v. *Williams*, 341 U. S. 58, 68 (1951) evaluated 18 U. S. C. § 1621, involved in the appeal before us, in this fashion:

> "Here • • • we have a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury. • • • The effect of the alleged false testimony could not result in a miscarriage of

> justice in this case but the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony."

Parker, on the other hand, was not under indictment at the time of his January appearance. The record reveals him as a man of limited formal education—attendance in Chicago public elementary schools through the fourth grade. He did not consult a lawyer prior to his initial testimony before the Grand Jury, nor for all this record shows was he advised by any lawyer as to the giving of his testimony in the presence of the January Grand Jury. Though Parker was a professional bondsman we cannot conjecture how much knowledge he possessed concerning the privilege. Nor do we think our decision need rest on any such flimsy basis.

After all the January Grand Jury was not investigating perjury violations—that was the function of the August, 1955 Grand Jury which returned the indictment now under review. Even if we assume that the newspaper clippings attached to the defendant's motion to dismiss the indictment clearly establish Parker as the target of the January Grand Jury investigation, we are unable to say that his concomitant perjury is eradicated by a failure to warn him of his privilege against self-incrimination. Indeed, legalistically speaking, Parker was neither obliged nor compelled to give testimony which might possibly expose him to the criminal charge of perjury for his act and intent constituting that crime had their genesis in his grand jury room utterances.

Mr. Bates, foreman of the January, 1955 Grand Jury, testified that he administered (see: Rule 6, Federal Rules of Criminal Procedure, 18 U. S. C.) the oath taken by

Parker when the defendant first appeared before that Grand Jury. The oath Parker took at the hands of Bates supplied to the foreman "by Judge Barnes' court," was as follows: "You do solemnly swear that in the testimony you are about to give before this Grand Jury you will speak the truth, the whole truth and nothing but the truth, so help you God." Certainly that is a solemn admonition to testify truthfully.

United States v. *Bell*, 81 Fed. 830 (C. A. Tenn. 1897), vigorously urged upon us by the defendant, is an isolated specimen of what an early court envisaged as basic unfairness. Bell was indicted for perjury, under Rev. St. U. S. § 5392, arising out of an examination before a pension examiner. But the distinguishing factor in that opinion lies in the fact that Bell was a notary public who made a false certificate to a pension certificate filed with the United States Department of the Interior. Bell was acquitted of making that false certificate in December, 1895. A year later the grand jury returned the perjury indictment, under review by the Circuit Court, against Bell based upon his examination before the pension examiner, on November 14, 1895, who reduced Bell's statements to narrative form and to which Bell made oath. Bell apparently testified that "He supposed that the examiner had all the official authority to detain him, and compel him to submit to an examination * * *" The short of it is that Bell certified, as notary, a female deponent had "personally appeared" before him and the government contended she did not—an established fact admitted by defense counsel. While this is a shortened version of the operative facts, it serves as a background for the following reasoning appearing in the court's opinion.

"* * * I have already mentioned that it could hardly have been expected that this defendant, when con-

fronted with an investigation concerning the making of his notarial certificate, should admit that it was false. He might be expected to swear that it was true until at least, as on this trial, its falsity was put beyond all question, for that would be the human tendency of one capable of making a false certificate in the beginning. The examiners probably already knew that it was false, though it does not appear in the evidence here, except by inference, that they had then found out that Hattie Woods was in Missouri, and not in Dorsey's office, when the certificate was made. Why were they not then contented to prosecute on that conclusive evidence, as they must have been under Rev. St. § 860, if that applies, since they knew that nothing the defendant would say upon this examination could be used against him for any offense previously committed in respect of his false certificate? Of what value was this examination, in view of that section, and to what pending issue did it appertain, or to what was it pertinent? Bell might be used as a witness against Dorsey, no doubt; but he was asked nothing about Dorsey's wrongdoing in the premises, and the examination was confined to Bell's own conduct. His counsel has argued that this shows that the only purpose of this inquisitorial proceeding was to lay the foundation for this indictment for perjury. The examiner denies this, and it is altogether probable that his only purpose was to carry out his instructions, and fully develop the facts for the information of the authorities and prosecutions of offenses. This may relieve the examiner of the imputation of inveigling or leading Bell into the temptation of false swearing, in order to entrap him; but, in its relation to Bell himself, the proceeding was none the less dangerous to him, and its effect on him and his constitutional rights was none the less disastrous because the examiner did not intend to entrap him. He was entrapped as a fact by his own yielding to the temptation to take the bait, and sustain his false certificate, by standing by it with his oath."

(Opinion)

"I have no doubt from the proof in this case that the defendant was guilty of making a false certificate, nor that he was guilty afterwards of falsely standing by his false certificate, by the oath that he took before this examiner; and although, in this particular case, the United States lost no money, and the pensioner lost no money, and no particular harm was done in that regard, I should say for myself that it was a fradulent proceeding against the United States, by false certificates, to deny to the pension bureau that security which is provided for by requiring a magisterial officer to identify the pensioner at the time of the payment, and otherwise protecting the pension funds against a fradulent misuse of them; but, having been formerly acquitted by a jury of the offense of making a false certificate, it does not now lie with us to hold the defendant responsible for any offense he committed in that respect, and he now and here stands not only under the ordinary presumption of innocence, but under the sanction of that acquittal, as having committed no such offense. And yet it is sought by this prosecution for perjury substantially to punish him for the same thing, because he subsequently to the making of the false certificate, before the examiner, in one of these inquisitorial examinations, in ignorance of his right to protect himself by silence, has yielded to the temptation to sustain his certificate by swearing that it was true. Heinous as the crime of false swearing is under our law, it is entitled to no other relaxation of the constitutional guaranty of the citizen in order to punish it, than any other offense."

It is clear, then, that Bell was a suspect interrogated by the examiner for the purpose of bolstering the prosecution's case. Bell's false certificate precipitated the inquiry producing his incriminating statements. That case is inapposite on its facts and its sweeping dictum irrelevant here. Other than some newspaper stories attached to the

defendant's motion to dismiss the indictment, we find this record barren of evidence pointing to Parker as the target for an indictment in January, 1955. Assuming, without deciding that Parker was earmarked for formal accusation by the January Grand Jury, and was indicted by it for tax evasion, policy games and other types of gambling, then the question of whether the failure to warn corroded and infected evidence underlying such indictments would be squarely in issue. But the January, 1955 Grand Jury sought revelation not perpetration. The evidence of perjury was untainted.

Parker was admonished to speak the truth. To argue, in substance, that if he had been advised of his constitutional right of silence he would not have perjured himself would be unsound, if not absurd. On the other hand if there was a duty to warn Parker, and the failure so to do treated as fatal error, would result, here in a license to commit perjury. In the setting of this case, based upon the record, we think it insufficiently demonstrated that investigation undertaken by the January, 1955 Grand Jury was aimed at accusing Parker by way of indictment. Consequently it was unnecessary that the federal prosecutors advise him of his constitutional privilege at that time.

United States v. *Debrow*, 346 U. S. 374, 376 (1953) describes the offense of which Parker was accused and convicted.

> "The essential elements of the crime of perjury as defined in 18 U. S. C. § 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing."

Parker focuses one phase of his appeal on the third element; with stress laid upon the requirements of wilfulness and materiality, and there is little, if any, controversy over the first two ingredients of perjury mentioned in the *Debrow* opinion. Under § 1621 perjury consists of statements of any material matter which the accused "does not believe to be true." Thus perjury "consists in testifying to the truth of a fact which the accused does not believe to be true; his oath must contradict his belief as to the facts sworn to, for otherwise his oath is not wilfully false." *United States* v. *Remington*, 191 F. 2d 246, 248 (1951). Several aspects of the problem before us were summarized by the opinion reported as *Young* v. *United States*, 212 F. 2d 236, 240-241 (D. C. 1954).

> "To return a verdict of guilty on a charge of perjury a jury must, of course, be convinced, beyond a reasonable doubt, not only that the accused testified falsely but that he did not, at the time, believe his testimony to be true. The first inquiry in a determination of whether or not the evidence was sufficient for the jury to fine an accused guilty of perjury relates to the application of the 'two witness rule.' This rule is misnamed. It does not require the testimony of two witnesses. Properly stated it is that 'the uncorroborated oath of one witness is not enough to establish, for purposes of conviction of perjury, the falsity of sworn testimony * * *' (cases collected)
>
> "Fulfillment of the two witness rule is necessary for conviction of perjury. It is not, however, sufficient for conviction. An additional requirement is that the jury could reasonably believe that there was no reasonable doubt as to defendant's guilt * * * (citing) This requirement, of course, relates to both elements of perjury: the falsity of the testimony and the lack of belief in its truth. Generally, a belief as to the falsity of testimony may be inferred by the jury from proof of the falsity itself * * *" (Footnotes omitted).

Materiality of the defendant's utterances heard by the grand jurors is an indispensable element of statutory perjury. "* * * the materiality of what is falsely sworn, when an element in the crime of perjury is one for the court * * * (cases collected)." *Sinclair* v. *United States*, 279 U. S. 263, 298 (1929). Indeed the Parker jury was instructed by the trial judge: "Whether a statement made by a witness before a Grand Jury is immaterial to the matter then being investigated by the Grand Jury is a question of law to be decided by the trial judge and not by the jury." Immediately thereafter the following instructions were given:

> "If you find beyond a reasonable doubt that the Grand Jury inquiry took place as alleged, and that in reply to the questions asked, the defendant made the statements in substance that:
>
> 1). He had not been in New York, New York since 195[4]5, when he was discharged there;
>
> 2). He never met Claude Murphy, but saw him for the first time in 1953 in Luther Rawlings' tavern, and thereafter only spoke with him casually in said tavern on passing on the street, and
>
> 3). He never had anything to do with the police who were on gambling squads with reference to telling them where gambling places were operating, as alleged in the indictment.
>
> You are instructed, ladies and gentlemen, that the statements would be material to the matter being investigated. The mere possibility that a witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment of the Constitution when summoned to give testimony before a Grand Jury."

When reviewing a conviction under § 1621, the court in *United States* v. *Moran*, 194 F. 2d 623, 626 (2d Cir.

1952) pointed out that: "The test of materiality of false testimony is whether the testimony has a natural effect or tendency to influence, impede or dissuade the investigating body from pursuing its investigation * * * (cases collected)." The opinion in *Moran* shows that the Congressional Committee was investigating the relationship between public officials and organized crime and "Moran was an official; Weber a convicted gambler. The number of times they met could well have a bearing on the intimacy of their relations, and false statements by Moran as to the frequency of those meetings could thwart or impede the inquiry and prevent disclosure of other facts."

There is absent any relationship between defendant's thesis of the requirement of warning and the materiality of his testimony before the Grand Jury. Parker's statements, under oath, on January 20, 1955, were material to the investigation, but their materiality did not necessitate a warning such as that given him by the Assistant United States Attorney when Parker subsequently appeared before the grand jurors. Mr. Bates, foreman of the grand jury testified, for the government, that on January 20, 1955, "the jury was investigating possible income tax evasion with special emphasis on gambling activities, various gambling activities in the City of Chicago with special emphasis again on policy." Parker's statements, set out in the first and second counts of the indictment, we think, come within the framework of that investigation and were material. *United States* v. *Moran*, 194 F. 2d 623 (2nd Cir. 1952), *Blackman* v. *United States*, 108 F. 2d 572 (5th Cir. 1940). Our view that the utterances were material is buttressed by *Dolan* v. *United States*, 218 F. 2d 454 (8th Cir. 1955).

Our canvass of this record reveals that the government's proof meets the well-settled standards and principles applicable to prosecutions for perjury. *Young* v. *United States,* 212 F. 2d 236 (D. C. 1954), *United States* v. *Marachowsky,* 201 F. 2d 5 (7th Cir. 1953).

We leave undiscussed, but not unconsidered, other questions presented on defendant's behalf. Those questions, include *inter alia,* sufficiency of the evidence, conduct of the trial, various rulings on exhibits, reception of evidence and scope of cross-examination. Well briefed as those points were, we found on close analysis that they failed in reaching the status of reversible errors. We conclude that Parker was properly and constitutionally convicted for violating 18 U. S. C. § 1621.

The judgment of conviction brought here for review is affirmed.

JUDGMENT AFFIRMED.

A true Copy:
Teste:

/s/ KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 351

HAROLD PARKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Reply Brief Of Petitioner To Brief For The United States In Opposition.

LORING B. MOORE,
123 West Madison Street,
Chicago 2, Illinois,

MOORE, MING & LEIGHTON,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3988

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Reply Brief Of Petitioner To Brief For The United States In Opposition.

Now comes the petitioner and presents herewith his Reply Brief in opposition to the Brief of the United States in Opposition to petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, or so much thereof as the petitioner deems proper, and says, as follows:

As To "Questions Presented."

Petitioner states that the adequate and correct statement of the "Questions Presented" is as stated in petitioner's Petition, and that the "Questions Presented" as set forth in the Government's Brief in Opposition are misleading as shown by examination of the "Questions Presented" in petitioner's Petition for Certiorari.

As To "Statement."

The Brief for the United States in Opposition is misleading and inaccurate in the following respects:

a. The appearances of the petitioner before the January 20, 1955, Grand Jury, beginning on January 20, 1955, and including two subsequent appearances, constituted a single hearing in response to the original subpoena served on him.

b. The "Statement" in the Brief in Opposition asserts that, "Inter alia, on January 2 (20), the grand jury asked whether petitioner had been in New York in 1951, in order to determine whether he had met a Claude Murphy there." The testimony of the petitioner before the grand jury as submitted to the trial court nowhere discloses that the witness was asked such a question by the grand jury; nor does the indictment so charge (Exhibit B to Defendant's Motion to Dismiss Indictment; App. 30; Indictment, App. 6; Government's Exhibits 1B, 2B, 3B (withdrawn), and 4B). However, the petitioner did testify *on trial* that he had been asked by the grand jury if he had been to the Rawlings fight in New York (which took place in 1951) and had answered that he had, but that such questions and answers were not set forth in

the report of his grand jury testimony as submitted by the Government; he further identified assistant Government attorneys who were present when he so testified before the grand jury. These witnesses were not subsequently called by the Government to rebut his testimony on that point. (See "Statement of Facts" in petitioner's Petition, page 15).

The Government's "Statement" is correct in stating that the petitioner as a witness before the grand jury had not been advised on the occasion of his appearance on January 20, 1955, when he gave the alleged testimony upon which the counts of the indictment upon which he was convicted were based, and that he was advised and warned on the occasion of March 21, 1955.

As To "Argument."

1. The Government's "Argument" deals with situations in which immunity statutes are involved. The privilege against self-incrimination is not an immunity, and a question presented by the petitioner's Petition for a Writ for Certiorari is whether the Government in its administration of the grand jury gave adequate protection to the constitutional guaranty of the privilege against self-incrimination, particularly in the premises of the subpoena of the petitioner as a witness and in the requiring of his testimony when he was an unmistakable target of the investigation.

We refer to the statement of Circuit Judge Frank in *United States* v. *Scully*, 225 F. 2d 113, in dealing with the questions as to when warning is necessary under the circumstances of the petitioner's case, as follows:

"Were that rule applicable here, I would hold as follows:

> "(a) It would be improper to conjecture that the defendant, if he had been warned, might nevertheless have testified voluntarily.
>
> "(b) So, too, a conjecture that he knew his privilege; *Wood* v. *United States*, 75 U. S. App. D. C. 274, 127 F. 2d 265, 277-278; *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 58 S. Ct. 1019, 82 L. E. 1461.
>
> "(c) If he gave answers before the grand jury without a warning, the error would not be cured by the fact that, desiring to explain those answers, he later voluntarily appeared, on advice of counsel, and testified before the grand jury."

It is unrealistic, and the Government is hardly forthright, when it contends that it was not the purpose of the Government to seek indictment of the petitioner upon the charges of the "convict-informer" Murphy, when it called the petitioner as a witness immediately after Murphy had testified. The indictment of the petitioner for perjury was an alternative resort, when the Government failed to find support for the "convict-informer's" charges, and the procedure was a clear abuse of the privilege against Self-incrimination.

2. The scope of grand jury investigation is not involved in the petitioner's contention that he should have been informed of the general subject matter of the grand jury investigation in order for him to judge "as to materiality." The standards of criminality as referred in petitioner's petition and the *Watkins* case are pertinent because the investigation is here used as a basis for criminal charges. Grand juries are a part of our legal system and our rules of fair play, common sense and respect for constitutional guaranties apply to grand jury

proceedings. Evidence unconstitutionally obtained cannot be used as the basis for criminal prosecution.

3. The petitioner again suggests that Congress intended that trial errors committed in the face of the jury should be weighed by Appeal Courts as to their effects upon the jury.

a. Does the Government seriously contend that where a witness gives oral testimony which is taken down in shorthand notes the original shorthand notes presented by the court reporter witness are not a proper subject of cross-examination when used as a basis for proof for perjury, and that cross-examination can be properly limited in this respect to whether the transcript conforms to the shorthand notes? As noted in the Government's Argument, the trial court first permitted cross-examination on the shorthand notes and then restricted it after cross-examination on a particular upon which the petitioner was charged and convicted showed a discrepancy requiring a longhand notation.

Other items in the Government's Brief in Opposition are sufficiently dealt with in the petition of the petitioner.

Respectfully submitted,

LORING B. MOORE,
123 West Madison Street,
Chicago 2, Illinois,
Attorney for Petitioner.

MOORE, MING & LEIGHTON,
123 West Madison Street,
Chicago 2, Illinois,
Of Counsel.

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No. 351

In the Supreme Court of the United States

OCTOBER TERM, 1957

HAROLD PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
WILLIAM J. SCHAFER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 244 F. 2d 943. The opinion of the District Court is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1957 (Pet. App. B). A petition for rehearing was denied on July 8, 1957. The petition for a writ of certiorari was filed on August 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a trial for perjury before a grand jury was barred by reason of the fact that petitioner, who had been identified as the conduit of moneys to a police officer, was not warned of his privilege against self-incrimination.

2. Whether it is a defense to perjury that petitioner was not informed of the subject matter of the grand jury investigation.

3. Whether there was error in the trial court's rulings on evidence.

STATEMENT

In a five-count indictment returned in the United States District Court for the Northern District of Illinois, petitioner was charged with perjury before a 1955 federal grand jury (R. 6–10). He was convicted on the first and second counts, and sentenced to concurrent terms of three years in prison and cumulative fines of $1,000 (R. 198–199).[1] On appeal, the conviction was affirmed.

The 1955 grand jury before which petitioner was called was investigating possible income tax evasion as the result of gambling activities in Chicago (R. 38). Petitioner's indictment was based on testimony he gave when summoned pursuant to subpoena on January 20, 1955. He also testified at later hearings in March and August (R. 38).

Inter alia, on January 2, the grand jury asked whether petitioner had been in New York in 1951, in

[1] The third and fifth counts were dismissed on the government's motion (R. 37). Petitioner was acquitted on the fourth (R. 197).

order to determine whether he had met a Claude Murphy there. Petitioner testified that he had not been in New York since 1945, when he was discharged from the army there (R. 7). This testimony formed the basis of count one (R. 6–7). Two witnesses testified for the government that they had seen petitioner in New York in 1951 (R. 118–120). One of petitioner's witnesses, on cross-examination, testified that he had been with petitioner in New York in 1951 (R. 143). Petitioner himself, on his third appearance before the grand jury in August, 1955, had admitted that he had been in New York in 1951, saying that he had misunderstood the question put to him in January (R. 150).

Petitioner was also asked when he knew Claude Murphy, and what the nature of the relationship was. Petitioner testified before the grand jury that he had never formally met Murphy, had seen him for the first time in 1953 in a tavern, and had spoken to him casually thereafter in the tavern or on the street (R. 7). This testimony was the basis of count two (R. 7–8).

Five witnesses introduced by the government testified that petitioner knew Claude Murphy well enough to address him by his first name as early as 1950. They testified that on a number of occasions in 1952 and 1953 they had seen Murphy and the petitioner talking, sometimes with others and often by themselves, in a tavern or on the street (R. 110–117).

Before trial, petitioner moved to dismiss the indictment on the ground that his testimony before the

grand jury on January 20, had been illegally obtained in that he had not been advised of the subject matter of the investigation, and had not been informed of his privilege against self-incrimination, although he was the target of the investigation (R. 12–13).[2] He attached to his motion two articles which had appeared in the Chicago Daily Tribune on January 17 and 20, 1955, the day petitioner was called before the grand jury, both reporting that petitioner was named by Charles Murphy, a convict, as the "man" who collected money from policy operators for a south side police officer (Exhibits A and H to petitioner's motion to dismiss indictment, R. 30). The motion to dismiss the indictment was denied (R. 31). Petitioner's motion for judgment of acquittal, relying in large part on the same contentions, was also denied (R. 182).

In submitting the case to the jury, the judge charged that "[t]he mere possibility that a witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment of the Constitution when summoned to give testimony before a Grand Jury" (R. 189). Petitioner objected to the charge alleging that it was prejudicial because it suggested the possibility of an indictment (R. 197).

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[2] Before his March appearance, petitioner was warned that the grand jury was conducting an investigation of possible tax evasions, that he might be involved, and that he had the privilege to refuse to incriminate himself (Exhibits B and 4-B to petitioner's motion to dismiss indictment, R. 30).

ARGUMENT

1. Petitioner contends (Pet. 18–22) that his prosecution for perjury was barred by reason of the fact that he was not informed of his constitutional privilege against self-incrimination at the time of his appearance before the grand jury, when, he argues, he was the unmistakable target of the investigation. To this argument, there are two answers: (1) petitioner was not the target of the investigation but a witness; (2) the failure to inform him of his privilege, whatever effect such omission might have on an indictment against him with relation to the subject matter of the investigation, did not give petitioner a license to commit perjury and immunity from prosecution for perjury.

a. The evidence of the newspaper articles showing that petitioner had been identified as the collector of money for a police officer, far from showing that petitioner was a target of the investigation, shows that he was not. In the investigation of possible income tax evasions as the result of gambling activities, the ultimate receiver of the money was certainly much more the target of the investigation than the mere conduit of the money. In *United States* v. *Scully*, 225 F. 2d 113 (C. A. 2), on which petitioner relies, the grand jury, before it called Scully in connection with an investigation of frauds in government purchases, knew that Scully had ordered bids to be rigged on twenty occasions and had deposited in his bank account $4,000 more than he earned. Even so, the Court of Appeals, in upholding the district court's denial of Scully's

motion to dismiss an indictment charging him with participation in fraud, found it far from clear that Scully had been marked for prosecution, and ruled, 225 F. 2d at p. 116:

> * * * the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.

Petitioner was much less clearly marked for prosecution than was Scully.[3]

b. In any event, even if petitioner should have been warned, and even assuming the very debatable position that failure to warn a witness may be a ground for dismissing an indictment against him with relation to the subject matter of the investigation, we think it is clear that, when petitioner did undertake to testify, he had no license to commit perjury and could not acquire immunity from prosecution for his perjury. This Court in *Glickstein* v. *United States*, 222 U. S. 139, 142, held with relation to a statute granting immunity in lieu of the privilege:

> * * * the immunity afforded by the constitutional guarantee relates to the past and does not

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[3] In *United States* v. *Bell*, 81 Fed. 830 (W. D. Tenn.), the witness, when he appeared before the examiner, was definitely the object of the investigation, since the examiner knew that the witness had executed a false pension certificate. *Boyd* v. *United States*, 116 U. S. 616, also cited by petitioner, is wholly inapposite for there, under the statute held unconstitutional, the failure to produce was taken as a confession of guilt, thus in effect imposing a penalty for exercise of the claim of privilege.

endow the person who testifies with a license to commit perjury.

See also *Cameron* v. *United States*, 231 U. S. 710, 720. Similarly, whatever immunity may result from failure to inform a witness as to his privilege, it does not go so far as to excuse deliberate and wilful perjury. *Claiborne* v. *United States*, 77 F. 2d 682 (C. A. 8); *United States* v. *Miller*, 80 F. Supp. 979 (E. D. Pa.); *United States* v. *Cason*, 39 F. Supp. 731 (W. D. La.); see *Glickstein* v. *United States*, 222 U. S. 139; *Wechsler* v. *United States*, 158 Fed. 579 (C. A. 2); *Edelstein* v. *United States*, 149 Fed. 636 (C. A. 8).

The case of *United States* v. *Bell*, 81 Fed. 830 (W. D. Tenn.), upon which petitioner relies to establish the rule that the testimony of a witness uninformed of his constitutional right may not be the basis of an indictment for perjury, has not been followed. See *United States* v. *Thomas*, 49 F. Supp. 547, 551 (W. D. Ky.).

2. Petitioner's contention (Pet. 23–24) that his prosecution for perjury was barred because he was not informed of the subject matter of the investigation, and could not determine what questions were material, is answered by the opinion of this Court in *Blair* v. *United States*, 250 U. S. 273. As this Court there said, at p. 282, "He is not entitled to set limits to the investigation that the grand jury may conduct." A witness may be compelled to testify before a grand jury without being apprised of either the subject matter of the inquiry or the names of the persons against whom the inquiry is addressed. *In*

re Black, 47 F. 2d 542 (C. A. 2); *United States* v. *Neff*, 212 F. 2d 297 (C. A. 3).

Petitioner contends that, by analogy to *Watkins* v. *United States*, 354 U. S. 178, he was entitled to have knowledge of the subject of the grand jury investigation so he could determine the materiality of his testimony (Pet. 23–24). The *Watkins* case dealt with refusal to give testimony before a Congressional investigating committee; the case at hand concerns the affirmative act of perjury in a grand jury investigation. The investigative scope of these two agencies are much different. That difference was recognized by this Court in the *Watkins* case when, speaking of the Congressional investigative power, the Court said, p. 187:

> But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. * * * Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government.

3. There is no merit in petitioner's complaint (Pet. 24–25) that he was accorded inadequate review by the statement of the Court of Appeals that it was leaving "undiscussed, but not unconsidered" various questions raised by petitioner as to rulings on evidence, none of which it found to reach the status of reversible error (Pet. App. B. xvii). None of the contentions urged by petitioner shows error at all.

a. Petitioner was given a list of changes to be made in the transcript of his testimony before the grand

jury, which had been furnished to him pursuant to court order, in order to conform the copy to the stenographic notes (R. 12). During the cross-examination of the four court reporters, petitioner had each point out where the various corrections in the transcript and stenographic notes had been made (R. 40–42, 46–54, 56–73, 87–97). The government objected to the questions concerning changes in the transcript on the ground that these changes had been made before the exhibits were offered into evidence and that as long as the transcript, as offered in evidence, accurately reflected the contents of the stenographic notes, it was immaterial what changes had been made between the time of preparation and the time they were offered in evidence. The court agreed, and sustained the objections (R. 58–60, 61, 64, 65, 69, 72). Also, during the cross-examination of one court reporter petitioner's attorney asked if there was an erasure in her notes over the symbol for "San Francisco" (R. 52). The reporter replied that there had been a penciled note for "San Fran" (R. 52). Petitioner's attorney then asked the reporter if she knew where San Pedro was (R. 53). After the court reporter answered "California or Mexico", the court interrupted the examination and stated that he was not interested in geography (R. 53). The court then restricted the cross-examination by petitioner's attorney to whether the transcript conformed to the stenographic notes (R. 53, 54).

The cross-examination had, at most, only very remote bearing on the statements for which petitioner

was on trial. The limitation was well within the discretion of the trial judge. See *Michelson* v. *United States*, 335 U. S. 469; *Glasser* v. *United States*, 315 U. S. 60.

b. Petitioner's testimony at the later hearings before the grand jury was first put in evidence by the government and then withdrawn on the government's motion before the jury had a chance to see it (R. 84–85). The court instructed the jury to disregard any reference to such exhibits. Petitioner's motion for a mistrial upon the ground that no instruction could be given to the jury which would avoid prejudice was denied (R. 182). The claim of error in this ruling is patently frivolous.

c. The objection that the court erred in striking questions and answers to bring out the fact that petitioner had not been told of his privilege before he testified depends on petitioner's argument that this fact would give him immunity for his perjury. Moreover, Government's Exhibit 1–B, containing the testimony, itself revealed that the advice had not been given.

d. The judge's charge that the possibility of indictment did not require that the witness be warned did not prejudicially suggest that petitioner might be indicted. It was petitioner himself who had wished to show that he was the target of the investigation. Moreover, the judge had previously told the jury that the fact that an indictment had been returned was not evidence nor was the indictment evidence (R. 185–

186). The casual reference to the possibility of some other indictment could not have been prejudicial.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
WILLIAM J. SCHAFER,
Attorneys.

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